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ABSTRACT

The global financial crisis has led regulators and legislators in the United States and in the European Union to introduce a number of rules and regulations aimed at addressing market failures and improving regulatory enforcement in the banking and finance industry. The increasing convergence and complementarity of competition law and regulation across many regulated sectors, and the perceived commonality in interest, should mean that the antitrust authorities are strongly positioned to play an active and wide-ranging role alongside the financial regulators. Yet there is no consensus on whether unfettered competition in the banking sector will produce an optimal outcome in terms of financial stability.

Some believe that intense competition may be detrimental to stability by causing excessive risk taking, while others argue that too much oversight into the financial industries will chill investment activities and stifle the markets.

The apparent conflict between competition policy and a fundamental aim of financial regulation may explain, in part, why there has historically been a resistance to allowing competition policy to intervene heavily in the financial services sector. In particular, there are concerns regarding the ability of antitrust rules to address, quickly and effectively, conduct connected with deficiencies in market structure and transparency. This paper takes a comparative approach and examines how the enforcement of the competition rules in the United States and in the European Union could be constrained—on conflict grounds—by broadly-based rules and regulations addressing perceived market failures in the financial sector. It then briefly details the enforcement action taken by the U.S. and EU antitrust authorities in the financial sector following the advent of the economic crisis.

Finally, the paper concludes by discussing whether the apparent differences between the two systems may lead to divergent enforcement outcomes, particularly in terms of the level of scrutiny by the respective antitrust authorities. This discussion also highlights the risk of conflicts arising from the divergent interests of financial regulators and antitrust authorities.

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I. INTRODUCTION

The 2008 global financial crisis has given rise to a new set of supervisory and prudential rules and regulations governing the banking and finance industry. Regulators and legislators in the United States¹ and in the European Union², in particular, have been proposing and introducing a raft of legislative and regulatory measures to address apparent market failures and to improve regulatory enforcement.

The increasing convergence and complementarity of competition law and regulation across many regulated sectors, and the perceived commonality in interest, should mean that the antitrust authorities in the United States and the European Union are strongly positioned to play an active and wide-ranging role alongside the financial regulators.

Yet there is no consensus on whether unfettered competition in the banking sector will produce an optimal outcome in terms of financial stability. Some believe that intense competition may be detrimental to stability³ by causing excessive risk taking, while others argue that too much oversight into the financial industries will chill investment activities and stifle the markets.

The apparent conflict between competition policy and a fundamental aim of financial regulation may explain, in part, why there has historically been a resistance to allowing competition policy to intervene heavily in the financial services sector. In particular, there are concerns regarding the ability of antitrust rules to address, quickly and effectively, conduct connected with deficiencies in market structure and transparency.

In the United States, the application of antitrust laws to regulated industries such as the financial services industry has sometimes been expressly precluded by statute, or implicitly by the courts. U.S. courts, for instance, give strong deference to traditional securities market regulators.⁴ At the EU level, the exclusion of the competition rules is generally not foreseen, but the EU Merger Regulation⁵ specifically provides for the competition assessment to be overruled by the need to protect other legitimate interests, in particular, “prudential rules.”⁶ Also, at the national level, a number of EU Member States appeared slow to grant the competition authorities unrestricted access to the banking sector.⁷

There seems to be a renewed appetite on the part of the antitrust authorities, both in the United States and the European Union, to use competition law instruments to challenge, in particular, suspected abuses of market power.

The European Union, for example, is currently examining whether the control and dissemination of financial market information by alleged dominant players unlawfully forecloses the market and distorts competition.¹⁰

In the United States, President Barack Obama and his administration pledged early in the presidency to increase antitrust enforcement in regulated industries and to maintain enforcement during the economic crisis. Christine Varney, Assistant Attorney General of the Department of Justice’s (“DOJ”) Antitrust Division, emphasized in May 2009 that “[f]irst there is no adequate substitute for a competitive market, particularly during times of economic distress. Second, vigorous antitrust enforcement must play a significant role in the Government’s response to economic crises to ensure that markets remain competitive.”¹¹

It can be questioned, however, whether the introduction of a more robust financial regulatory scheme and the apparent resurgence of concerns about competition potentially weakening financial stability, and even possibly impeding effective regulation, will not have damaging consequences for competition law enforcement in the financial sector, and the banking industry in particular.

This paper takes a comparative approach and examines how the enforcement of the competition rules in the United States and in the European Union could be constrained—on conflict grounds—by broadly-based rules and regulations addressing perceived market failures in the financial sector. It then briefly details the enforcement action taken by the U.S. and EU antitrust authorities in the financial sector following the advent of the economic crisis. Finally, the paper concludes by discussing whether the apparent differences between the two systems may lead to divergent enforcement outcomes, particularly in terms of the level of scrutiny by the respective antitrust authorities. This discussion also highlights the risk of conflicts arising from the divergent interests of financial regulators and antitrust authorities.

II. THE U.S. POSITION

The application of U.S. antitrust laws to regulated industries, such as the banking and financial services industry, may be precluded in several ways. First, a regulatory statute may explicitly state that it precludes the application of antitrust laws. Second, when a regulatory statute is silent with respect to the application of antitrust laws, a court may find that the regulatory regime implicitly precludes the application of the antitrust laws. Congress may preserve the simultaneous operation of antitrust and regulation by the inclusion of a statutory savings clause specific to antitrust.

A) FIRST PRINCIPLES: THE U.S. SUPREME COURT'S BILLING DECISION

The Supreme Court's latest position on the application of antitrust laws to a regulated industry came in 2007 with *Credit Suisse Securities (USA) LLC v. Billing*.¹² The plaintiffs alleged that securities underwriters conspired to increase compensation for initial public offerings by inflating commissions and aftermarket prices under the pretext of the accepted practice of syndication. The Supreme Court ruled that the securities laws displaced the antitrust laws for the underwriters' activities and identified four factors to determine if "the securities laws are 'clearly incompatible' with the application of the antitrust laws,"¹³ namely: (1) whether the underlying market activity is "an area of conduct squarely within the heartland of securities regulation"; (2) whether there is "clear and adequate Securities and Exchange Commission (SEC) authority to regulate" the conduct; (3) whether the conduct has been subject to "active and ongoing agency regulation," and; (4) whether a "serious conflict," or even a potential future conflict, exists between the antitrust and regulatory regimes.¹⁴ As regards the fourth factor, the Supreme Court recognized that evidence of a "potential future conflict" might suffice for the securities laws to preclude antitrust liability "even in respect to a practice that both antitrust law and securities law might forbid."¹⁵

Billing left unanswered the question of how to apply the four factors and whether all four must weigh in favor of the regulated entity. This ambiguity has been reflected in the lower courts' subsequent treatment of the *Billing* test, but *the emerging consensus is that the conflict factor is decisive.*

The U.S. Court of Appeals for the Second Circuit addressed the issue in *Electronic Trading Group, LLC v. Banc of America Securities, LLC*, where it found that all four factors weighed in favor of implied immunity.¹⁶ The short-seller plaintiff claimed that prime brokers charged "artificially inflated" borrowing fees to customers short-selling securities. The defendants allegedly designated securities arbitrarily as hard-to-borrow and fixed minimum borrowing fees for those securities. In applying *Billing*, the Second Circuit explained that, for cases involving regulated bodies, "[m]uch depends on the level of particularity or generality at which each *Billing* consideration is evaluated."¹⁷ The court concluded that the first three *Billing* factors are to be "evaluated at the level most useful to the court in achieving the overarching goal of avoiding conflict between the securities and antitrust regimes" and that the fourth factor "is evaluated at the level of the alleged anticompetitive conduct."¹⁸ It therefore appears that the critical factor for implied immunity is the conflict prong: where there is a conflict, or the prospect of a conflict,

the court is likely to find implied immunity to avoid a clash

between the two federal statutory regimes.

In at least one significant case since *Billing*, a court has determined that the antitrust laws and securities regulation are not incompatible. In *Dahl v. Bain Capital Partners, LLC*,¹⁹ the trial court denied an effort to dismiss claims that private equity firms violated antitrust laws through the use of "club deals" (arrangements where groups of private equity funds sponsor leveraged buyouts ("LBOs")). The plaintiffs, a class of shareholders of companies that were taken private, alleged that the private equity firms conspired to allocate the LBO market in order to pay less than fair value of the target companies. Rejecting the private equity firms' argument that the U.S. Securities and Exchange Commission ("SEC") supervised the transactions in issue, the court held that "pre-emption does not apply here as the private nature of the LBOs at issue prevents the SEC from regulating these transactions."²⁰ Significantly, the trial court granted the plaintiff-shareholders' motion to expand the scope of their antitrust case to include ten additional transactions.²¹

While the U.S. courts wrestle with the implications of *Billing* in civil antitrust actions challenging conduct in the financial markets, the impact of the decision may be felt more acutely in two different contexts. First,

Billing is certain to be relevant to the legislative provisions of the Dodd–Frank Act

and the role of antitrust considerations in the rulemaking process within its new statutory scheme. Second, the decision is likely to reverberate throughout the investigations and other initiatives undertaken by the DOJ's Antitrust Division and its self-perceived role as an important participant in the evolution of the emerging derivative trading platforms that will define the financial markets for years to come.²²

B) THE DODD-FRANK ACT

A notable recent example of an antitrust savings clause can be found in the influential Dodd-Frank Act, which aims to reduce risk, increase transparency, and promote market integrity within the financial system.²³ The Act enhances oversight and control in the financial sector by creating new recordkeeping, reporting, and execution requirements, and by giving regulatory bodies more power to make and enforce rules.

Billing suggests that the expansion of agency power would make activities under the Dodd-Frank Act prime candidates for implied antitrust immunity. However, § 6 of the Dodd-Frank Act contains a general antitrust savings clause²⁴ patterned on one that the Supreme Court found overcame implied preclusion of antitrust laws in *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, LLP*.²⁵ The Supreme Court upheld the effect of the savings clause, even though the enforcement scheme set up by a telecommunications regulatory regime was “a good candidate for implication of antitrust immunity.”²⁶

Modelling the Dodd-Frank Act's antitrust savings clause on the Trinko clause indicates a legislative attempt to combat the effects of Billing by precluding immunity.

Antitrust considerations are addressed elsewhere in the Dodd-Frank Act. The Insurance Bill contains its own antitrust savings clause that expressly mandates application of the antitrust laws even where there is a conflict.²⁷

Moreover, regulators must consider antitrust where the Dodd-Frank Act requires that actions conform with provisions from other Acts containing restrictions on anticompetitive behavior, such as § 17A of the Securities Exchange Act of 1934.²⁸ By contrast, Title VII of the Dodd-Frank Act, which regulates the over-the-counter derivatives market and gives broad rulemaking powers to agencies, contains eight “Antitrust Consideration” provisions that place antitrust concerns behind those of the Dodd-Frank Act by allowing regulated entities²⁹ to engage in anticompetitive activities where “necessary or appropriate to achieve the purposes of [Dodd-Frank]....”³⁰

These antitrust considerations operate, in effect, as a codification of Billing's fourth factor,

consistent with Electronic Trading Group's interpretive gloss. Because Congress is capable of both specifying that conflicts should be resolved in favor of antitrust laws (as with the Insurance Bill), and delegating to regulators the responsibility of determining when antitrust laws should be pre-empted (as with Title VII), the antitrust considerations may be invoked to allow for antitrust immunity notwithstanding the general savings clause.

C) UNRESOLVED QUESTIONS

Notwithstanding its antitrust savings clause, it is an open question whether the U.S. courts will find that the Dodd-Frank Act precludes the application of antitrust laws. First, would a court apply the *Trinko* analysis in the financial context to find that the Dodd–Frank Act's broad antitrust savings clause completely bars implied preclusion of the antitrust laws? As Justice Clarence Thomas noted in his dissent in *Billing* (decided after *Trinko*), it is arguable that the antitrust savings clause contained in the Securities Exchange Act should have been given the same weight as that considered in *Trinko*.³¹ The majority, however, rejected this argument. This distinction between the two savings clauses, as well as lower court decisions applying *Billing*, suggest that the *courts may view the financial industry as a special area where deference to federal regulators is especially important.*

It remains to be seen, however, whether deference to agencies will survive the perceived regulatory failures that are blamed for the credit crisis.

Second, in light of the credit crisis, will the DOJ respond by increasing its oversight of financial markets? Given the Obama administration's intensification of antitrust enforcement, coupled with the Dodd–Frank Act's general antitrust savings clause indicating the legislative intent of greater oversight and liability, the DOJ might modify its current approach.

Third, *Trinko* requires that, even if a statute contains a broad antitrust savings clause, a court “must always be attuned to the particular structure and circumstances of the industry at issue” and weigh the costs and benefits of antitrust intervention accordingly.³² This leaves open the possibility that antitrust claims asserted in the context of a regulated industry may not survive, even in the face of a broad antitrust savings clause; indeed, the *Trinko* court ultimately found that the plaintiffs failed to state a valid antitrust claim. The inclusion of the Insurance Bill's savings clause also suggests that had Congress wanted to completely preclude antitrust immunity, it could have done so by using similar strong language as it did for the general savings clause.

The extensive new regulations (and attendant uncertainty) that the Dodd–Frank Act imposes on the banking and financial services industry, combined with the flurry of litigation arising out of the credit crisis and the possibility of treble damages for antitrust claims, strongly suggest that the intersection between antitrust law and the regulated financial market will be the subject of important litigation in the near future.

III. THE E.U. POSITION

The position taken by the Supreme Court in the *Billings* case is very different from the approach adopted by the EU institutions, including the Court of Justice of the European Union (the “ECJ”). The ECJ has consistently tried to ensure the broadest application of the competition rules in the EU Treaty³³ and has considerably limited the opportunity for parties to invoke a “regulatory defense” on the grounds of concurrent and conflicting application of sector-specific regulations and competition rules.

A) THE GENERAL APPLICABILITY OF THE EU ANTITRUST RULES

The ECJ summarily dismissed initial attempts in the 1980s to argue that the EU competition rules did not apply to the financial sector. In *Züchner v. Bayerische Vereinsbank AG*,³⁴ the defendant bank unsuccessfully argued that the EU Treaty provisions on competition did not generally apply to banks due to “the special nature of the services provided by such undertakings and the vital role which they play in transfers of capital.”³⁵ In particular, the bank claimed that the financial activity (transfer of funds between Member States) should be treated as a service of general economic interest (“SGEI”³⁶) falling outside the scope of the EU competition rules.

The court firmly rejected this broad assertion and stated that it would need to be established that the bank(s) had been specifically entrusted by an act of a public authority with such an SGEI.³⁷

A different challenge was equally rejected by the court in *Verband der Sachversicherer v. Commission*.³⁸ The property insurers' association claimed that the EU competition rules could not be applied to the industry since the EU Council had yet to adopt special rules making them applicable to the insurance industry.³⁹ The association considered that there was an “obligation on the Council to temper the rigour of the prohibitions contained in the Treaty in so far as is necessary to ensure the survival of certain areas of economic activity.”⁴⁰ It sought to highlight that “unlimited competition would result precisely in an increased risk of some insurance companies going out of business in view of the special characteristics of the industry.”⁴¹ Nevertheless, the ECJ emphasized that the Treaty contained no express derogation for the insurance industry and that the EU competition rules applied without restriction.

B) E.U. ANTITRUST RULES IN A “PRIVILEGED” POSITION

The presence of extensive (and increasing) EU and national rules and regulations addressing the financial sector creates, nonetheless, the opportunity for conflicts between regulatory provisions dealing with transparency and market conduct and EU antitrust rules which require free and open competition.

The hierarchy of norms within the EU legal system—with Treaty provisions and general principles of law at the pinnacle, above secondary legislation and implementing measures—places the competition rules enshrined in

Articles 101 and 102 of the Treaty on the Functioning of the EU (“TFEU”) in a privileged provision. Nonetheless, it is difficult to envisage EU legislative acts in the financial services area being readily challenged⁴² before the General Court (formerly the CFI) or the ECJ on grounds of their lack of conformity with the competition rules in the TFEU.⁴³ In any event, internal screening⁴⁴ within the EU institutions, and shared policy goals, including promotion of undistorted competition⁴⁵ within the Internal Market, are likely to reduce substantially the scope for conflicts between EU laws.

With regard to national laws and regulations, *the ECJ has largely limited the options for invoking a regulatory defense* to exclude the application of the EU competition rules. It has repeatedly stated that the EU competition rules are only inapplicable “if anti-competitive conduct is required of undertakings by national legislation, or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part.”⁴⁶ The EU antitrust rules would apply, however, if the national rules left open the possibility for competition, and if competition could be harmed by the autonomous conduct of the companies.⁴⁷ This would especially be the case if the national rules encouraged or made it easier for the companies to engage in anticompetitive conduct.

The EU legal order also places strict limits on the ability of Member States and national authorities to introduce or maintain legislation and regulations that could render EU laws ineffective. It is established case law that *the primacy of EU law requires any provision of national law that contravenes EU law, including the EU antitrust rules, to be disapplied by national courts and administrative bodies*, regardless of whether the provision in question was adopted before or after the EU provision. In circumstances where national rules and regulations conflict with the EU competition rules, the EU rules are given preeminence, although penalties cannot be imposed by the antitrust authorities in respect of past conduct required by national law.⁴⁸ To reduce further the scope of divergence, and ensure unity of interpretation of EU law, the ECJ will also give rulings on provisions

of national law (outside the EU sphere) that refer to the content of provisions of EU law or adopt the same solutions as those found in EU law.⁴⁹

C) A “REGULATED CONDUCT” DEFENSE?⁵⁰

Direct conflicts between national rules and regulations and related provisions in EU law are becoming less common due to the greater convergence between European legal systems and the increasing harmonization of legal norms in the European Union, especially in relation to the Internal Market. However, opportunity for conflict in interpretation and application remains, especially in heavily regulated sectors.

In recent years, the ECJ and the General Court have considered the extent to which intervention by national regulators in the telecommunications sector could be used by companies as a defense to findings of antitrust infringement.

In the *Deutsche Telekom* (“DT”) case,⁵¹ the company argued on appeal before the General Court, and subsequently before the ECJ, that there could not be abusive pricing in the form of a margin squeeze because the charges were imposed by the German regulator (“RegTP”). However, the General Court ruled that “the fact that the applicant’s charges had to be approved by RegTP does not absolve it from responsibility under Article 82 EC [now Article 102 TFEU].”⁵² Both the General Court and the ECJ noted that the attribution of any infringement to DT depended on whether it had sufficient scope to fix its charges at a level that would have enabled it to end or reduce the margin squeeze. The courts found that DT had responsibility under Article 102 TFEU, despite national regulatory approval, as it had sufficient scope to end or reduce the margin squeeze within the limits imposed by regulation (i.e. in this instance, by increasing the retail prices within the price cap). The ECJ upheld the General Court’s finding that DT had failed to exercise this discretion by not increasing its retail access prices.

A similar question has arisen in relation to the European Commission’s (“Commission”) 2007 margin squeeze decision concerning the Spanish incumbent telecoms operator Telefónica. Surprisingly, the Spanish government has itself appealed the decision on a number of grounds, including: that the decision impinged on the regulatory framework in force in Spain

(a framework grounded in EU law and supervised by the Commission); that it resulted in an ex post change to the regulatory framework, and; that the matter had already been addressed by the Spanish regulator.⁵³

The pending appeal provides the courts with the opportunity to add to the jurisprudence on the interface between competition and regulation. It would, nonetheless, be unexpected for the General Court to depart from the ECJ's (and its own) previous case law and allow greater latitude for regulatory regimes to displace the EU competition rules.

IV. ANTITRUST ENFORCEMENT IN THE FINANCIAL SECTOR AFTER THE ONSET OF THE 2008 CRISIS

Parallel activity of financial regulators and antitrust authorities will not always raise questions of conflicts; there are areas where dual enforcement can be beneficial without giving rise to dispute. The complementarity of the two instruments has been highlighted by the EU Commissioner for Competition, Vice President Joaquín Almunia. He emphasized that “regulation tackles broad structural market failures” and “you need competition policy to tackle the harmful behaviour of individual market participants.”⁵⁴

The Commission has thus been very active in the financial services sector, notwithstanding the introduction of many new legislative and regulatory measures. Similarly, the Antitrust Division of the U.S. DOJ has been actively participating in the Financial Fraud Enforcement Task Force, which, for instance, has pursued a wide-ranging investigation into price-fixing in the municipal bonds investment market.

A) THE DOJ'S ANTITRUST INVESTIGATIONS AND ADVOCACY

The DOJ's activities have been marked by four recent investigations into the financial markets. In 2010, KeySpan Corp. admitted to violating antitrust laws by entering into a swap agreement with its largest competitor, thereby eliminating its incentive to sell electricity at lower prices.⁵⁵ Investigations into the municipal bonds investment market, credit derivative markets and the London Interbank Offer Rates (“LIBOR”)

are still ongoing. The municipal bonds investigation resulted in restitution and other financial penalties imposed on Bank of America in December 2010 and UBS in May 2011, amounting to \$137 million and \$160 million, respectively. In July 2011, the DOJ announced that JP Morgan Chase had agreed to pay a total of \$228 million in restitution, penalties and disgorgement to federal and state agencies. This investigation also resulted in nine guilty pleas to criminal offenses and pending criminal charges against nine other individuals.

For the credit derivatives and LIBOR investigations, no public action has yet been taken and the DOJ has yet to clearly or directly target the activities of “Too Big To Fail” banks.

However, the DOJ has taken a more active role in the context of the Dodd-Frank Act rulemaking process.

It pointedly commented on the U.S. Commodity Futures Trading Commission's (“CFTC”) proposed rules for derivatives clearing organizations, designated contract markets and swap execution facilities.⁵⁶ Citing its “significant experience in issues relating to the derivatives industry,”⁵⁷ the DOJ expressed its strong support for the CFTC's plan “to create meaningful limits on ownership of [derivative trading platforms], as well as its use of governance restrictions as a safeguard against conflicts of interest.”⁵⁸ The DOJ explained, for example, that “major dealers might use their control of a dominant trading platform to disadvantage rivals by refusing to trade their products or to continue trading over the counter in instances where exchange trading is feasible.”⁵⁹

B) THE COMMISSION'S ANTITRUST INVESTIGATIONS

The Commission has increased the number of investigations in the financial sector following the onset of the economic crisis.

These high-profile investigations have often been targeted at areas of the financial services sector that have been viewed in some European political circles as lacking appropriate regulatory oversight and transparency.⁶⁰

In *Standard & Poor's (S&P)*,⁶¹ the Commission recently investigated whether the ratings agency had been charging abusive prices in violation of Article 102 TFEU with regard to its legal monopoly over the distribution of International Securities Identification Numbers developed by ISO, the International Organization for Standardization. S&P offered commitments to change its pricing policy to address competition concerns identified by the Commission in the Statement of Objections and, following revisions made in response to observations received in the course of a market test, the Commission adopted a decision on November 15, 2011, making the commitments binding on S&P.⁶²

In *Thomson Reuters*,⁶³ the Commission has been investigating whether Thomson Reuters is infringing Article 102 TFEU by imposing certain restrictions on the use of Reuters Instrument Codes, which prevent customers or competitors from translating these codes to alternative identification codes of other datafeed suppliers. It is reported by the Commission that, without the possibility of such mapping, customers may potentially be "locked into" working with Thomson Reuters because the procedure to replace the codes by reconfiguring or by rewriting software applications is long and costly.

The Commission is also carrying out investigations into the credit default swaps ("CDS") sector.⁶⁴ The Commission has reported that it is examining whether sixteen investment banks and Markit (a provider of financial information in the CDS sector) have been foreclosing access to raw data to other information service providers. It has also reported that it is separately investigating nine of the sixteen banks in relation to the tariffs granted by ICE Clear Europe (a clearing house for CDS) that allegedly create an incentive for the banks to use only ICE, thereby preventing entry by other clearing houses.

More recently, the Commission commenced an investigation into the sector of financial derivative products linked to Euro interest rates (Euribor) with a series of high-profile on-site inspections. The Commission reported that it was seeking evidence of possible illicit arrangements.⁶⁵

V. CONCLUSION

The emergence of a broad set of new rules and regulations governing market behavior by banks and

financial institutions, as well as the greater oversight of the sector by (in some cases) recently-created supervisory agencies, heightens uncertainty and increases the risk of substantive and jurisdictional conflicts between antitrust and financial regulation, both in the United States and in the European Union.

The mechanisms and prospects of resolving these concerns in the United States and in the European Union seem very different. The U.S. system appears to be prepared to show greater deference to regulation. It also provides the possibility for the legislature or the courts to disapply the antitrust rules in the overarching interest of avoiding conflict between financial regulations and antitrust rules. In the European Union, *the incorporation of the competition rules in the EU Treaty and their role as instruments of market integration lends them a quasi-constitutional aura,*

thereby limiting the options for them to be overridden. This may explain why the DOJ's efforts indicate a cautious interventionist approach to the financial sector, while the Commission appears to be increasingly willing to launch high-profile antitrust investigations into the financial markets.

There are, however, a number of built-in safety valves in the EU system that can reduce the potential for conflicts. First, enforcement is primarily led by competition authorities, and these administrative bodies are likely to be more attuned to the risks associated with conflicting legal regimes than private litigants enforcing their rights through the courts. Second, it can be argued that the EU competition rules, and in particular Article 101(3) TFEU,⁶⁶ provide for public policy considerations to be factored into the antitrust assessment. Therefore, at least in terms of enforcement outcome, *the difference between the U.S. system and the EU system is probably less pronounced than it appears*

from the underlying legal instruments and court precedents, especially as there is increasing coordination and commonality between antitrust authorities.

Conflicts in the financial sector may arise not only from a difference in antitrust enforcement by the U.S. and EU

competition authorities, but could also flow from the diverging interests of financial regulators and competition authorities. In particular, financial regulators might not share the competition priorities of antitrust authorities and might view antitrust instruments as too blunt and unwieldy to be effective in the highly complex area of banking and finance.

One can also imagine that antitrust authorities' concerns about heightened entry barriers or increasing market transparency in certain highly concentrated financial markets may sit oddly with financial regulators' aims of strengthening prudential safeguards across the industry. In this regard, it is worth highlighting, as an example, that the European Union has been substantially increasing the regulatory oversight of credit rating agencies ("CRAs").⁶⁷ In the European Union, CRAs will be subject to extensive centralized regulation by the recently created European Securities and Markets Authority.⁶⁸ There is, however, a general perception of a lack of competition⁶⁹ in the sector, due to the unrivaled position of the three leading CRAs, and it remains to be seen whether the increased regulatory burden may not further weaken competition by considerably increasing the cost of market entry.⁷⁰

The increasing forays of antitrust into an ever more heavily regulated financial services sector bring the possibility of conflict to the fore. Given the importance of the sector to the wider economy and the concerns about stability, contagion, and systemic risk, *measures may need to be taken to ensure proper transparency of the role or authority of antitrust agencies* with regard to their sphere of influence in the banking and financial services area.

- 1 See Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010).
- 2 The European Union created three new European Supervisory Authorities: the European Banking Authority ("EBA"), the European Insurance and Occupational Pensions Authority ("EIOPA"), and the European Securities and Markets Authority ("ESMA"). The European Union is also reviewing and revising a number of Directives and Regulations to, among other things, strengthen prudential requirements, improve internal risk management, and increase the level of available information. Measures are also being taken to improve transparency and adapt regulation to the innovation occurring in the financial markets. See European Commission, Regulating Financial Services For Sustainable Growth (Feb. 2011); see generally European Commission, Financial Services – General Policy, http://ec.europa.eu/internal_market/finances/index_en.htm (last visited Nov. 15, 2011).
- 3 See, e.g., Barbara Casu, Claudia Girardone & Philip Molyneux, *Is There a Conflict Between Competition and Financial Stability?*, in RESEARCH HANDBOOK FOR BANKING AND GOVERNANCE (James Barth, Clas Wihlborg & Chen Lin eds., 2011).
- 4 See *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975); *United States v. National Ass'n of Securities Dealers*, 422 U.S. 694 (1975).
- 5 Council Regulation 139/2004, art. 21(4), 2004 O.J. (L 24) (EC) (providing that Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by the Merger Regulation).
- 6 See Stéphane Kerjean, *The Legal Implications of the Prudential Supervisory Assessment of Bank Mergers and Acquisitions Under EU Law* (European Central Bank, Legal Working Paper Series No. 6, Jun. 2008), available at <http://www.ecb.int/pub/pdf/scplps/ecblwp6.pdf> (discussing prudential interests and European merger control rules).
- 7 For example, until the end of 2005, the Italian central bank, not the competition authority, applied the competition rules. In addition, the Dutch banking sector was excluded from the application of the merger control regime in the national Competition Act for two years following its entry into force in 1998, since mergers between banking and insurance institutions were already regulated by sector-specific legislation on the basis of a wider test applied by the Minister of Finance (or, in specific situations, the Dutch Central Bank).
- 8 See, e.g., John Fingleton, Chief Executive, Office of Fair Trading, Speech at the Charles River Associates Conference: Competition Policy in Troubled Times (Jan. 20, 2009); Neelie Kroes, former European Commissioner for Competition Policy, Speech at the Bundeskartellamt conference Dominant Companies – The Thin Line between Regulation and Competition Law: The Interface Between Regulation and Competition (Apr. 28, 2009).
- 9 See Joaquín Almunia, Vice President of the European Comm'n responsible for Competition Policy, Speech at the Conference on Competition in Sensitive Sectors of the Romanian Economy: Fuelling Growth in Romania: The Role of Competition Policy (Oct. 21, 2011). See also DG Competition, How Competition Policy Is Helping Economic Recovery, <http://ec.europa.eu/competition/recovery/index.html> (last visited Nov. 28, 2011).
- 10 The Commission has recently investigated the activities of Standard & Poor, and is currently conducting investigations into (i) Thomson Reuters, and (ii) 16 investment banks and Markit (CDS market). See also Joaquín Almunia, Vice President of the European Comm'n responsible for Competition Policy, Speech at CASS Business School: Competition Policy Issues in Financial Markets (May 16, 2011). See also Section IV, *infra*.
- 11 See Christine Varney, Assistant Attorney General, Antitrust Division, U.S. DOJ, Remarks as Prepared for the Center for American Progress: Vigorous Antitrust Enforcement in this Challenging Era (May 11, 2009).
- 12 *Credit Suisse Securities LLC v. Billing*, 551 U.S. 264 (2007).

- 13 *Id.* at 285.
- 14 *Id.*
- 15 *Id.* at 273.
- 16 *Electronic Trading Group, LLC v. Bank of America Secs., LLC*, 588 F.3d 128 (2d Cir. 2009).
- 17 *Id.* at 131.
- 18 *Id.* at 132.
- 19 *Dahl v. Bain Capital Partners, LLC*, 589 F. Supp. 2d 112 (D. Mass. 2008).
- 20 *Id.* at 117.
- 21 *Dahl v. Bain Capital Partners, LLC*, No. 07-1288 (EFH), slip op. (D. Mass. Sept. 7, 2011).
- 22 *See, infra*, Section IV.
- 23 Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010).
- 24 *Id.* § 6 (“Nothing in this Act, or any amendment made by this Act, shall be construed to modify, impair or supersede the operation of any of the antitrust laws, unless otherwise specified.”).
- 25 *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).
- 26 *Id.* at 406.
- 27 Dodd-Frank Act § 541 (“Nothing in this subtitle or the amendments made by this subtitle shall be construed to modify, impair or supersede the application of the antitrust laws. Any implied or actual conflict between this subtitle and any amendments to this subtitle and the antitrust laws shall be resolved in favor of the operation of the antitrust laws.”).
- 28 Securities Exchange Act of 1934, §17A, 15 U.S.C. § 78a et seq. (2006). *See, e.g.*, Dodd-Frank Act § 763 (“In reviewing a submission . . . , the Commission shall review whether the submission is consistent with section 17A.”).
- 29 The Antitrust Considerations apply to derivatives clearing organizations, swap data repositories, swap dealers, major swap participants, swap execution facilities, boards of trade, security-based swap execution facilities, swap data repositories, security-based swap dealers, and major security-based swap participants.
- 30 *See, e.g.*, Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010).
- 31 *Credit Suisse Securities LLC v. Billing*, 551 U.S. 264, 288-289 (2007) (Thomas, J., dissenting).
- 32 *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 411 (2004).
- 33 EU Treaty, Title VII, Chapter 1.
- 34 Case C-172/80, Gerhard Züchner v. Bayerische Vereinsbank AG, 1981 E.C.R. 2021.
- 35 *Id.* at ¶ 6.
- 36 Services of general economic interest (“SGEI”) are economic activities that public authorities identify as being of particular importance to citizens and that would not generally be supplied (or would be supplied under different conditions) if there were no public intervention (e.g. transport networks).
- 37 Züchner, 1981 E.C.R. at ¶¶ 6-9.
- 38 Case-45/85, Verband der Sachversicherer e.V. v Commission, 1987 E.C.R. 405.
- 39 Article 87(2)(c) of the EEC Treaty [now Article 103(2)(c) TFEU] allows the EU Council to define, if need be, in the various branches of the economy the scope of the provisions of Articles 101 and 102 TFEU.

- 40 Verband der Sachversicherer, 1987 E.C.R. at ¶ 7.
- 41 *Id.*
- 42 The legality of EU acts—producing legal effects vis-à-vis third parties—can be challenged directly before the General Court pursuant to Article 263 TFEU (and on appeal to the ECJ). They can also be indirectly challenged via a reference from a national court for a preliminary ruling by the ECJ (Article 267 TFEU). The ECJ and the General Court have exclusive jurisdiction to determine acts of EU institutions invalid (see Case 314/85, Foto-Frost v. Hauptzollamt Lübeck-Ost, 1987 E.C.R. 4199).
- 43 Articles 101 and 102 TFEU are directed at the conduct of private undertakings and the duty of “sincere cooperation” in Article 4(3) of the TFEU (formerly Article 10 EC Treaty) is principally addressed to the Member States. Article 4(3) of the TFEU acts as the catalyst to challenge the legality of national measures on grounds that they undermine the effectiveness of EU law which can include the application of the EU competition rules. The duty of sincere cooperation does not appear as far-reaching in relation to actions of the EU Institutions, and it has been held that it does not apply to legislative measures adopted by the EU Council (see Joined Cases C-63/90 and C-67/90, Portugal and Spain v. Council, 1992 E.C.R. I-5073, ¶ 53). Article 7 TFEU, which provides that “[t]he Union shall ensure consistency between its policies and activities, taking all of its objectives into account . . .” does not seem a sufficiently precise alternative catalyst to challenge EU legislation on ground of lack of conformity with the EU competition rules.
- 44 There is extensive consultation, including inter-service consultation within the Commission, whenever the European Union proposes to introduce new laws and regulations. EU legislative and policy proposals are subject to an impact assessment, which includes an assessment of the possible competition impacts. See DG Competition, Better Regulation: A Guide To Competition Screening (2005), available at http://ec.europa.eu/competition/publications/legis_test.pdf.
- 45 The reference to “ensuring the competition is not distorted” is now included in a Protocol to the TFEU (No. 27) rather than in the Preamble to the Treaty. Nonetheless, this change in position is not expected to fundamentally alter the importance of achieving free competition in the European Union, since a protocol has equal force as the rest of the Treaty.
- 46 Joined Cases C-359/95 P and C-379/95 P, Commission and France v. Ladbroke Racing, 1997 E.C.R. I-6265, ¶ 33.
- 47 *Id.* at ¶ 34.
- 48 Case C-198/01, Consorzio Industrie Fiammiferi (CIF) v. Autorita Garante della Concorrenza e del Mercato, 2003 E.C.R. I-8055.
- 49 See Joined Cases C-297/88 and C-197/89, Dzodzi v. Belgium, 1990 E.C.R. I-3763.
- 50 For a broad and in-depth discussion of the concept, see Organisation for Economic Co-operation and Development [OECD], Regulated Conduct Defence, DAF/COMP(2011)3, Sept. 1, 2011.
- 51 Case T-271/03, Deutsche Telekom v. Commission, 2008 E.C.R. II-47; upheld on appeal in Case C-280/08 Deutsche Telekom AG v. Commission, 5 C.M.L.R. 27 (2010). These related to appeals from the Commission’s decision to fine Deutsche Telekom EUR 12.6 million for abusing its dominant position with respect to its local loop access pricing (see COMP/C-1/37.451, 37.578, 37.579, Deutsche Telekom AG, 2003 O.J. L 263/9).
- 52 Case T-271/03, Deutsche Telekom v. Commission, at ¶ 107.
- 53 Case T-398/07, Spain v. Commission, 2008 O.J. (C 8) 17. This case relates to an appeal from the Commission’s decision to fine Telefónica EUR 151 million for abusing its dominant position in the Spanish broadband market (see Case COMP/38.784, Wanadoo España v. Telefónica, 2008 O.J. (C 83)).
- 54 Joaquín Almunia, *supra* note ix.
- 55 The Complaint alleged that KeySpan, an electricity generator, manipulated New York City electricity prices using a swap agreement (the “Swap”) in violation of § 1 of the Sherman Act. Specifically, the Swap provided KeySpan with an indirect financial interest in the sale of electricity generating capacity by its largest competitor, Astoria Generating Company (“Astoria”). That financial interest obviated KeySpan’s need to bid competitively during the sale of its own electricity generating capacity at auction. According to the Complaint, KeySpan’s anticompetitive bidding drove up capacity prices as a whole and, in turn, increased the cost of electricity to consumers in New York City. See *United States v. KeySpan Corp.*, 763 F. Supp. 2d 633 (S.D.N.Y. 2011).
- 56 U.S. Dep’t of Justice, Comments in the Matter of Rin 3038-ADO1 (Dec. 28, 2010).
- 57 *Id.*, at § 1.
- 58 *Id.*, at § 3.
- 59 *Id.*, at § 1.

- 60 See, e.g., *EU to Deal Severely with CDS; Leaders Seek Ban*, REUTERS, May 17, 2010, available at <http://uk.reuters.com/article/2010/05/17/uk-eu-regulations-barnier-idUKTRE64G3NW20100517>.
- 61 Case COMP/39592, *European Fund and Asset Management Association (EFAMA) and others vs. Standard and Poor's*, available at http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39592.
- 62 For further background on the case, see Press Release, European Commission, Commission Market Tests Standard & Poor's Commitments on International Securities Identification Numbers (May 16, 2011), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/571&type=HTML>; Press Release, European Commission, Commission Makes Standard & Poor's Commitments to Abolish Fees for Use of US International Securities Identification Numbers Binding (Nov. 15, 2011), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1354&type=HTML>.
- 63 Case COMP/39654, *Reuters Instrument Codes*. For further background on the case, see Press Release, European Commission, Commission Opens Formal Proceedings Against Thomson Reuters Concerning Use of Reuters Instrument Codes (Nov. 10, 2009), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1692&format=HTML&aged=0&language=EN&guiLanguage=en>.
- 64 Case COMP/39745 CDS – Information market and Case COMP/39730 CDS – Clearing. For further background on the case, see Press Release, European Commission, Commission Probes Credit Default Swaps Market (Apr. 29, 2011), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/509&type=HTML>.
- 65 Commission officials carried out unannounced inspections, starting October 18, 2011, at the premises of companies active in the sector of financial derivative products linked to the Euro Interbank Offered Rate (“Euribor”) in certain Member States. See Press Release, European Commission, Commission Confirms Inspections in Suspected Cartel in the Sector of Euro Interest Rate Derivatives (Oct. 19, 2011), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/711&format=HTML&aged=0&language=EN&guiLanguage=en>.
- 66 Arrangements restricting competition can be exempted, provided they meet the cumulative conditions in Article 101(3) TFEU. The conditions are arguably broad enough to extend beyond pure economic efficiencies.
- 67 See, e.g., Regulation (EC) No 1060/2009 on credit rating agencies, as amended. On November 15, 2011, the Commission adopted proposals for a new Regulation and a new Directive on credit rating agencies, aimed at further strengthening the supervisory framework (see Press Release, European Commission, Commission Wants Better Quality Credit Ratings (Nov. 15, 2011), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1355>).
- 68 The rules will include (i) a registration requirement for a subsidiary (or certification if the CRA has no physical presence in the EU); (ii) rules of conduct for registered CRAs (enhanced transparency and the prevention of conflicts of interest between CRAs and their most important clients), and (iii) the supervision of registered CRAs. For a general overview of the supervision of CRAs by ESMA, see Steven Maijor, Chair of ESMA, Keynote Address at the Bundestag Panel Discussion (May 16, 2011).
- 69 For a general discussion of the topic, see OECD, *Competition and Credit Rating Agencies* 2010.
- 70 See, e.g., the UK authorities' response to the Commission internal market and services consultation document on credit rating agencies (“CRAs”), available at https://circabc.europa.eu/d/d/workspace/SpacesStore/0d1ea101-b6d0-470b-b8b3-e28e4c1c3a30/BoE-FSA-Treasury_EN.pdf (last visited Nov. 23, 2011) and, in particular, the comments in Section III - Enhancing Competition in the Credit Rating Industry (response submitted on Jan. 31, 2011). It should also be noted that the European Parliament proposed the creation of a new independent, preferably European, CRA, but this would in all likelihood distort competition by giving the EU public entity an advantage relative to its competitors.